Economic Development and Social Development - Do the Two Goals Meet?

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SESSEION V

LAW AND SOCIAL JUSTICE

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Introduction

The basic theme of the Human Development Report 2000[1] is the assumption that human development, which includes economic and social development, and human rights go hand in hand and that they cannot be detached. To the extent that the Report claims to be "unapologetically independent and provocative"[2], the assumption is perhaps subject to scrutiny. However, the Report with its large volume of statistics drawn from various reliable sources is fairly convincing. The following analysis is also based on the assumption that economic and social development, on the one hand, and economic and social rights are two sides of the same coin. It argues, however, that the inter-relationship between the "economic" factors and the "social" factors, which are used interchangeably in the Human Development Report, is not so self-evident. In fact, there are cases in which "economic" development and "social" development clash. In other words, the twin-like relationship between economic rights and social rights cannot be taken for granted.

I. Economic Rights and Social Rights

The answer to the above-captioned title appears almost self-explanatory. The fact that the International Covenant on Economic, Social and Cultural Rights places "Economic" and "Social" rights on equal footing shows that the two categories of rights have been conceived by the drafters of the Covenants as sets of legal rights, which can be grouped into the same international treaty. The UN Charter and the ILO Constitution also treat economic and the social rights, in such a way, that there is no doubt about the positive relationship between the two. In fact, some of the rights provided for in those

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1 Human Development Report 2000, UNDP, p. iii, p.9 etc.

2 ibid. p. i

international instruments are truly interchangeable. That is to say, whether they belong to the category of economic rights or social rights does not really matter. Take for instance the right of each person to enjoy a decent standard of living(Art. 11 of the Covenant on Economic, Social and Cultural Rights). It is an economic right and a social right, at the same time. A state party to the Covenant is promoting the social rights of its citizens by way of securing the economic right. Another example showing the inter-relationship, or interchangeability between social and economic rights can be found in the right to education. Article 13, para.2(a) of the Covenant, which provides for the right to a free primary education, can be considered as a provision of an economic right in that it compensates the education costs of citizens, but it is also a social right in that it offers basic education to individuals as citizens of a society. It is even a cultural right in the sense that it ensures the linguistic and historical "backbone" of a citizen.

We can go a step further and contend that economic and social rights cannot be dissociated from civil and political rights. Clear proof of this fact is demonstrated by the provisions on trade union rights, which can be found in both Covenants: Article 8 of the Covenant on Economic, Social and Cultural Rights, on the one hand and Article 22 of the Covenant on Civil and Political Rights, on the other.

While the indivisibility of economic rights and social rights appears to be obvious, it becomes less than self-explanatory, when the economic right is conceived in a wider scope, that is to say when we take examples from the group of rights categorized under the concept of the right to development. In other words, the relationship or the interchangeable nature of both rights becomes obscure in the field of the right to development. A clear case is shown in what is often referred to as a "development dictatorship". The GDP of Indonesia may have grown, but social development did not follow to the same extent. The same argument applies to the relationship between some activities of international development institutions. International financial institutions, such as the World Bank or regional development banks, are certainly working to achieve economic growth for developing countries. However, their operations may clash with those of other international institutions, such as the ILO and UN human rights bodies, when their policy guidelines contain factors, which have different or adversary effects on the objectives of the activities of the UN bodies.[3]

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[3] A number of recommendations contained in the World Bank's assistance package offered to Thailand during its

The somewhat problematical relationship between civil and political rights, on the one hand, and social, economic and cultural rights, on the other, is well known. While reconciliation has been made[4] to bridge the gap between the two, stubborn controversies still persist. It is still widely believed that economic and social rights are promotional in their nature and not self-executing and, the exercise of some of the civil and political rights have some negative effects in the realization of economic and social rights: an excessive exercise of the right to free association may end up in weakening the bargaining power of trade unions, thus resulting in a loss of the right to work (a social right.) The debate about the admissibility of the union-shop or closed-shop system during the drafting of the ILO Convention on Freedom of Association and the Protection of the Right to Organize (No.87) demonstrates this difficulty.

II. Economic Development and Social Development

Another example of controversy can be given in a possible clash of normative activities and operational activities of international institutions. International financial institutions, such as the World Bank and the IMF, operate with a view to assist member states in their efforts to raise economic growth, in other words to materialize their economic rights. An international normative organ, such as the ILO, on the other hand, has as its main mandate legislating in labour matters.

Let us take an imaginary case where a World Bank funded project clashes with the normative activity of the ILO: it is frequently observed that developing countries designate certain geographical areas as Export Processing Zones and apply different legal provisions in order to attract foreign investment. This type of special legal regime often includes a "non-union clause". It may also contain legal provisions suspending the application of certain labour laws which may also result in a non-implementation of internationally made commitments, namely the application of ratified ILO Conventions. It would appear, at first glance, that the Bank is not required to consider labour rights in its daily activities. In other words, the Bank would appear to be allowed to continue operating in a country which prohibits trade union freedom in general, or in a country in which forced or child labour can be abundantly found, for example. A development bank is under no legal duty to observe ILO Conventions. These duties are not provided

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financial crisis in the late nineties suggested deviation from various types of social policies Thailand had adopted, a minimum wage fixing system, for instance.

[4] The efforts of the UNDP's Human Development Report Office with its innovative Human Development Index is

for under its constitutional instrument. Here we find a situation in which an economic right (the World Bank's right to operate according to its mandate) clashes with a social right (the ILO's right, or duty, to promote.)

During the 1960s when a conflict arose between the UN and the World Bank concerning its loan activities to South Africa and Portugal, the latter's position was clearly expressed in its legal office's view that the Bank is guided by its constitutional instrument and that there was no legal reason why it should follow the UN's decision to enforce economic sanctions on those countries. The World Bank even maintained that its Articles of Agreement prohibited the Bank from intervening in the "internal affairs" of the loan receiving countries.[5]

The question to be asked here is whether such financial institutions are truly immune from "political" decisions, or rather whether there is not a "legal" obligation which may be relevant to the World Bank or other regional banks. It is, at least, sensible to ask whether an international institution with similar or even the same membership (all the members of the Asian Development Bank are members of the ILO, for instance) can adopt practices that are very different from another institution. One could even go one step further to inquire into the question of whether there can be multiple "public interests" in a single international society. This question of the conflict between the UN and development banks can be discussed more generally as an illustration of the conflict between economic development and human rights, in other words, between economic rights and social rights.

It is commonly known that Bretton Woods institutions set conditions when they decide financing. The infamous "conditionality" issue has not only been discussed among academics, but it is also an issue that the world mass media has frequently addressed. For some of the conditions set by the IMF and the World Bank gave direct and imminent hardship to the general public of loan-receiving countries and ordinary citizens, therefore, easily feel their effects. If a development bank invites a recipient country to adopt an income policy, and connected with it are a variety of economic measures, such as the lifting of a minimum wage law or the discouragement of free wage negotiations between social partners, the Bank is directly involved in infringing some of the basic workers' rights. In many cases that kind of situation would entail infringement of treaty obligations of the recipient countries.

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important.

We wish to ask ourselves whether there is no breach of international law if the financial institutions are aware of possible conflicts of international obligations by the loan receiving countries, such as child labour, discrimination, freedom of association and forced labour. Is it not wrong under international law to grant loans to countries in which the financial institutions know that the recipients will use them in a way that is incompatible with the terms of public international law. The financial institutions may also be in a position to foresee the possible infringement of treaty obligations of the recipient countries if loans are executed in an inappropriate way. Recipient countries are usually economically under-developed and, consequently, often lack sufficient technical infrastructure in government administration to foresee such infringements of their international obligations. International institutions with professional lawyers employed in their legal departments are in a far better position to assess the international legal implications of economic development projects to which they give their support. They would, therefore, be responsible for checking the compatibility of the projects with various international treaty obligations, including ILO Conventions.

III. Harmonization of Economic Rights and Social Rights

If it is too far-fetched to assume that there exists a rule in international law that development banks and similar entities have a legal obligation to check the conformity with international obligations of recipient countries, we can still presume a general obligation of development banks to adhere to established rules of international law. We would recall the Advisory Opinion on the Reparation Case,[6] in which the Court stated that the United Nations enjoys rights and duties in international law in so far as legal personality can be attributed to it. While dissenting opinions criticized the "necessary implication" theory, which the majority of judges supported, the subsequent practice of the UN, as well as, other ICJ Opinions[7] seems to confirm the majority view. It is obvious that international institutions cannot bear all the rights and duties nation states do. On the other hand, there is no rule in international law, which restricts the duties of international institutions to those, which are clearly stipulated in the constitutional instruments of each institution. If there is a "necessary implication" in giving power to the UN to demand reparation, why should there not be another "necessary implication"

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5 Ibrahim Shihata, *The World Bank in a Changing World*, Nijhoff, 1991, p.105.
6 ICJ Report, 1949, p. 174ff
7 For instance, the Advisory Opinion concerning the “Certain Expenses” case.

which makes the UN bear a certain set of international legal duties, which are not specifically mentioned in the constitutional instruments?

What the duties are, that international institutions must discharge because they have international legal personality, is a question, which has not been discussed substantially in the past. While not all of the rules of international customary law fall within the group of rules that cover international legal persons, few would contest that *ius cogens* be included here, such as the prohibition of slavery or piracy. The suppression of crimes against humanity is a relatively new rule, but it is considered to have entered into the realm of *ius cogens*.

It would be safe to maintain that international financial institutions, such as the World Bank, are obliged to observe the peremptory norms of public international law. It is, therefore, correct to insist on the compatibility of Bank operations with certain human rights standards as well as a number of ILO Conventions, which contain elements of *ius cogens*, the principle of freedom from forced labour being one of the most representative ones. The principle of non-discrimination underlies another set of Conventions, such as Convention No.111 and they are close to *ius cogens*. Whether the principle of freedom of association can be attributed with similar characteristics is a debatable question, but it would not be so very wrong to assert its status as customary international law, at least in the context of the ILO. In sum, the following can be maintained: the Bank is responsible under international law to ascertain the compatibility of its projects with a set of universally recognized rules of international law, particularly those which have attained the status of *ius cogens*.

Conclusion

This brief study started with the question whether economic rights and social rights are the same thing or not. We took up the case of a banking activity, which appears to clash with human rights standards. However, the conclusion (or an assumption, rather) is that it is not a clash but a conflict of legal rights, which must be resolved by resorting to the legal responsibility of certain international institutions, which derive from their legal personality in international law. It is by that process that economic rights and social rights can be harmonized.